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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 649

MANUEL SILVAS, *Petitioner*,

v.

THE STATE OF ARIZONA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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IN THE

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THE STATE OF ARIZONA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Arizona of June 27, 1962, as it became final by virtue of the order denying leave to file a petition for rehearing on October 30, 1962.

OPINION

The opinion of the Court below (app. infra) is reported at 372 P.2d 718.

JURISDICTION

The judgment of the court below was entered as noted above,

on June 27, 1962. The final order in respect to rehearing was October 30, 1962. The case itself is an appeal to the court below in a criminal case, and the death sentence has been imposed. This Court has jurisdiction to review the Supreme Court of Arizona under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether due process of law under the Fourteenth Amendment of the Constitution is denied where, in a State criminal proceeding in which a unanimous verdict of twelve is required by State law, one of the jurors becomes mentally incompetent in the course of the trial and the juror is thereupon rendered incompetent to carry out the functions of the jury position?

2. Whether under the due process clause of the Fourteenth Amendment a person may be tried and sentenced to death where, by virtue of his mental condition, he is unwilling to assist the defense in the preparation and presentation of the case?

STATEMENT

Petitioner was a tavern keeper in Coolidge, Arizona (T.667). He admittedly shot the deceased, Beatriz Mankel, at her home on February 12, 1959. For details as to his reasoning see T.484, 488, 500 and 503.

The defendant was hopelessly, not gloriously but incoherently drunk at the time of the shooting. For the record of his drinking, see T.296 297, 282, 609, 610. There is a distinct mystery, however, as to the number of shots involved. The doctor found seventeen puncture wounds in deceased's body (T.249) and on the other hand there is no evidence that this defendant fired six shells (T.325). He himself could shed little light on the matter since when he turned himself into the police he was downright unintelligible. (T.324).

The defendant entered a plea of not guilty and not guilty by reason of insanity. In the course of the trial counsel called to the

attention of the court that the defendant was no longer able to assist him or to understand the proceedings (T.754). At this point the court referred the matter to two psychiatrists. One testified that the defendant had been pressured into giving rational answers only by constant, insistent repetition of the applicable questions; and that from time to time the defendant was out of touch with reality. (T791, 817).

In spite of objections, the matter was allowed to go to the jury. After the verdict, one of the jurors, Mrs. Hobbs, contacted defendant's counsel, and informed him that she did not recall rendering a verdict in the case and declared that it was not her verdict. The affidavits show that she was found wandering on the streets in a catatonic state shortly after the trial, and that she had been unable to function as a juror. When found her hands were frozen to the steering wheel of the car and she was unable to speak or respond to any questions asked her. She was examined by a doctor who related her condition as a form of hysterical blackout (P.11, Hearing and Motion for a New Trial.) This juror denied that she had voted for a conviction or believed the defendant guilty.

As has been noted, one of the doctors testified in effect that the defendant was incompetent to be tried. However, the other doctor, also a respected member of the community, came to a somewhat different conclusion, as is fully developed in the opinion of the court below. Since this created something of a conflict in the evidence, that court felt free to follow the second doctor. The testimony of that doctor was not that the defendant was *unable* to assist but that he was *unwilling* to assist in his own defense. There was no explanation of the mental state of a person who might be thus unwilling to defend himself and so, in effect, usher himself into the gas chamber. In the light of what it thought to be a conflict, the Supreme Court permitted the conviction to stand.

REASONS FOR GRANTING THE WRIT

I. It is of course well settled that it is a denial of due process of

law to try a person and expose him to the death penalty if his mental condition is such that he is incapable of defending himself. *Dusky v. United States*, 362 U.S. 402 (1960); *United States v. Valentino*, 283 F.2d 634, 635 (2d Cir. 1960); *United States ex rel Mazy v. Ragen*, 149 F.2d 948 (7th Cir. 1945); *Ashley v. Pescor*, 147 F.2d 318 (8th Cir. 1945); *Moss v. Hunter*, 167 F.2d 683 (10th Cir. 1948); *Smith v. United States*, 267 F.2d 210 (9th Cir. 1959).

On the facts, this is a case which calls for the invocation of the foregoing rule. We submit that defendant was unable to assist in his own defense. A state rule of procedure under which all doubts are resolved against the defendant is itself unacceptable by Constitutional standards. The decision below depends altogether upon a distinction between one who is called "unable" to defend himself and one who is called "unwilling" to do so. We submit that "unwillingness" carried to this extreme is itself a form of mental incapacity which approaches that paralysis of the mind which makes trial, and particularly the death sentence, wholly inappropriate. *United States v. Chislom*, 149 F. 284 (Cir. Ala. 1906).

II. In this case the offense is compounded. A person himself who of unsound mind is convicted by a jury of twelve, one of whom concededly and by her own statement was not of sound mind at the time. Granted that State procedures may not require twelve jurors, those of Arizona do Art. 2, Sec. 23, Constn. of Arizona. This means that the jurors must themselves be competent to carry on their function.

Rule 228 of The Arizona Rules of Criminal Procedure expresspressly provides that each defendant is entitled to "a full jury of lawful persons."

CONCLUSION

This is not a very pretty business. The shooting itself, admittedly committed by this defendant, is about as ugly an affair as there

can be. But certainly the cause of civilization and of due process is not much improved when, assuming the killing, an utterly drunken, incoherent, and incompetent defendant is sentenced to death as a result of the action of a jury, one of whose members was at the moment as incompetent as he. We respectifully ask that the judgment of the Court below be reversed.

Respectifully submitted,

John P. Frank

December, 1962.

APPENDIX

Supreme Court

State of Arizona

EN BANC

STATE of ARIZONA, *Appellee.* *v.* MANUEL SILVAS, *Appellant.*	No. 1175

Appeal from Superior Court of Pinal County

The Honorable W. C. Truman, Judge

Judgment Affirmed

Wade Church, former Attorney General
E. D. McBryde, former Pinal County Attorney
T. J. Mahoney, former Deputy County Attorney
Robert W. Pickrell, present Attorney General
Attorneys for *Appellee*

Flynn & Allen, of Phoenix
Attorneys for *Appellant*

JENNINGS, Justice.

Defendant, Manuel Estrella Silvas, was tried and convicted of first degree murder. From the conviction and a sentence of death he appeals. The material facts, pursuant to our usual rule, will be stated in the light most favorable to sustaining the conviction. State v. McGee, 91 Ariz. 101, 370 P2d. 261 (1962); State v. Evans, 88 Ariz. 364, 356 P.2d 1106 (1960).

The defendant, a married man, lived with his family in Coolidge, Arizona, where he operated a small tavern. Beatriz Mankel, a married woman, resided in Casa Grande, Arizona, with her husband, children and mother. For approximately nine months prior to February 12, 1959, the defendant and Mrs. Mankel had been having an affair. Defendant had acknowledged his illicit romance to his wife although not as to the woman's name or place of residence.

On February 11, 1959, shortly before 11 p.m. the defendant called his wife from the tavern he operated and told her the "woman" wanted to see him once more and she would then leave him alone.[1] Mrs. Silvas asked the defendant if he had been drinking and he admitted he had been. She thereupon told him if he didn't feel good he should close the bar early and come home which he did. After arriving home, defendant quarreled with his wife over whether he should go see this other woman. Shortly after 11 p.m. defendant left the house with a gun. He was later seen in the New Deal Bar and the Wonder Bar in Casa Grande.

At approximately 1 a.m. Mrs. Mankel's mother, Angelita Olmos, heard someone at the front door of the Mankel house. She aroused her daughter who went to the door. Mrs. Olmos heard an argument lasting approximately fifteen or twenty minutes between her daughter and a man, whom she identified by voice as the defendant. Upon hearing six shots from a gun she rushed from

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[1] Defendant contended he had endeavored to break off the illicit romance although there is no direct evidence of such in the record.

her bedroom and ran outside, thinking they had come from outside the home. She then returned to the living room where she found her daughter slumped on the couch bleeding profusely. Her daughter was alive but expired shortly thereafter.

The defendant surrendered himself at the Casa Grande Police Department at approximately 5 a.m. He had with him a .38 caliber revolver containing six fired shells. A full statement was taken from him wherein he admitted shooting the decedent at her home.

Defendant made six assignments of error which will be considered in the order made. His first assignment is that the trial court erred in refusing to grant defendant's motion for a directed verdict. He contends that he was entitled to a directed verdict of not guilty since there was no evidence that the bullet wounds allegedly inflicted by defendant caused decedent's death.

The doctor[2] who performed the autopsy on decedent testified that there were seventeen wounds in decedent's body.[3] Defendant therefore asserts the proposition that since there was an odd number of holes in the decedent's body an no bullet remained in her body[4] at least one wound was not a bullet wound for "it is the simple physical law that a bullet which passes through a human body*** must leave an even number of holes." He argues that since there is no evidence that any one wound or any combination of wounds caused or would have caused death, and one wound couldn't have been caused by a bullet, it is possible decedent died

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[2] Dr. Roland F. Schoen was asked by the Casa Grande Police Department to do a post mortem upon the body of Mrs. Mankel.

[3] The evidence is not entirely clear as to the exact number of shots fired. Mrs. Olmos testified that there were six shots. Mr. Mankel (who was asleep in another bedroom at the time of the shooting) testified that he heard only four shots. Five bullets were found at the Mankel residence by the police. When the defendant surrendered his gun to the police officers it contained six empty shells.

[4] Dr. Schoen testified that the body of decedent was x-rayed and that no bullets were found therein.

solely from the "mystery wound."[5] He contends that in view of the circumstances surrounding the decedent's death (an adulterous wife entertaining her paramour in the darkened living room of the home wherein her mother and husband were) that someone, in a frenzy of anger, may have administered the "mystery wound" which at least contributed to and perhaps may have caused the death of the decedent.

Although it is apparent from examining the testimony of the witnesses that there is some conflict surrounding the events on the night of the shooting[6] it is not disputed that defendant called upon the decedent and that he fired the shots. There is no intimation anywhere throughout the record that anyone else had anything to do with the shooting other than he defendant. Nor

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[5] There was no evidence of any other weapon other than a pair of scissors lying on the couch. However, there was nothing in the record linking the scissors with decedent's death.

[6] Mrs. Olmos testified that she was lying awake and heard a knock about 1 a.m. (February 12, 1959); that she aroused the decedent who went to open the door; that a conversation between decedent and the caller, whom she identified as the accused, ensued for fifteen or twenty minutes; that she heard two shots fied and then four others in quick succession; that she rushed from her bedroom and ra[illegible] outside, thinking that the shots came from outside the home; that she saw a green and white car in front of the house which she said remained there for fifteen or twenty minutes more; that she returned to the living room, turned on the lights, saw her daughter slumped on the couch bleeding badly, and then "hollered" for her son-in-law.

Decedent's husband, who was sleeping in another room, testified that his wife woke him up saying the police department was calling for him (Mr. Mankel worked for the State Highway Department and was in the habit of being called out in emergencies); that after his wife left the room to answer the door he went back to sleep; that he was again awakened by four shots; that he ran through a darkened living room and went outside; that he saw a car pulling out; that he went back into the living room and saw his wife bleeding to death. He stated he heard no argument.

is there any evidence that the decedent died by other than "multiple gunshot wounds."[7]

Rule 270 of the Arizona Rules of Criminal Procedure provides that "if*** the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the defendant shall, direct the jury to acquit the defendant." However, there is no duty on the part of the court to direct an acquittal where there is substantial evidence that the defendant committed the crime of which he is accused. State v. Merryman, 79 Ariz. 73, 283 P.2d 239 (1955); State v. King, 66 Ariz. 42, 182 P.2d 915 (1947). In the case at bar the trial court felt the evidence was sufficiently strong to go to the jury. It did not err since there was substantial evidence that defendant committed the crime.

Defendant's second assignment of error is that the court erred in determining defendant was able to understand the proceedings and to assist in his defense. He contends that the reqirements of Rule 250, Arizona Rules of Criminal Procedure, were not met.[8]

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[7] Dr. Schoen testified "that the cause of death was multiple gunshot wounds." Defendant's cousel stipulated as to the doctor's qualifications, that he was a physician and surgeon and that he was qualified to conduct post mortems.

[8] Rule 250 provides:

"A. If before or during the trial the court has reasonable ground to believe that the defendant, against whom an indictment has been found or information filed, is insane or mentally defective, to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately set a time for hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

"B. If the court, after the hearing, decides that the defendant is able to understand the proceedings and to assist in his defense it shall proceed with the trial. If it decides that the defendant through insanity or mental deficiency is not able to understand the proceedings or to assist in his defense, it shall have the defendant committed to the institution authorized to receive him, ***."

On the fifth day of the trial, counsel for defendant advised the court that he was having difficulty in communicating with his client. Under the provisions of Rule 250 the court directed that defendant be transferred to the Camelback Sanitarium for examination by two psychiatrists, doctors William B. McGrath and Otto L. Bendheim.[2] A hearing was then held pursuant to Rule 250. At the hearing Dr. McGrath testified that although defendant was suffering from an emotional disturbance called a "disassociative reaction" (a form of hysterical reaction to stress) he was able to understand the proceedings against him and to assist in his defense. According to the testimony of Dr. McGrath the question was not whether defendant was *able* to assist in his defense, but rather whether he was *willing* to so assist. He testified as follows:

> "Q [By defendant's counsel] In other words, if I now ask him what he proposes to testify to in this case when he takes the witness stand and he refers me to the Bible in response thereto, would you not say he was to that extent unable to assist his counsel in this case?
>
> A No.
>
> Q You feel that he would be assisting me?
>
> A No; that wasn't the question. Whether he was able.
>
> Q That he was able?
>
> A He might not assist you, but that does not necessarily imply that he was unable to assist you."

* * * * *

[2] Prior to trial defendant's attorney filed a motion for a mental examination pursuant to Rule 250. Doctors McGrath and Bendheim were appointed to examine the defendant which they did. By stipulation of the parties the report of the doctors was received and filed with the court in lieu of the hearing provided for by Rule 250. Their conclusion at that time was:

> This man is able to differentiate right from wrong and to adhere to the right. He is able to comprehend charges filed against him and to assist counsel in his defense.

"Q And can you explain to me the phenomena of that occurring?

A Well, point 1, I do not feel that his referring you to the Bible is a sympton of a mental illness.

Q Yes.

A Point 2, I believe he has a choice. It is within his capacity to make the choice whether to answer your question relevantly or to refer you to the Bible.

Q I See.

A Third, if he refers you to the Bible I think it is because he is unwilling to answer your question in any other context or way, not unable.

Q But unwilling?

A Yes"

Q And is the unwillingness something that he can control?

A Yes."

Dr. Bendheim testified that at times defendant was "temporarily out of touch with reality." However, Dr. Bendheim was of the opinion defendant was able to understand the proceedings and to assist in his defense. He testified in answer to a question put by the court:

"The Court: Your answer to a situation in law is that he is not insane or mentally defected to the point he is not able to understand or comprehend the nature of the proceedings against him or assist in his defense?

A That is correct. I am convinced in my own mind that the defendant is able to assist counsel in his defense."

At the conclusion of the hearing the court stated it was satisfied defendant was able to assist counsel in his defense.

Where a court has ordered a hearing conducted as to a defendant's mental condition, the trial court's decision as to whether such defendant is able to stand trial will be upheld unless there is a manifest abuse of discretion. State v. Reid, 87 Ariz. 123, 348

P.2d 731 (1960). In the instant case there was no manifest abuse of discretion.

The third assignment is that the trial court erred in denying defendant's motion for a new trial upon the ground of misconduct and improper argument of the county attorney. Defendant contends that the county attorney, in his closing argument, improperly argued from facts not in evidence and "testified" by stating his own knowledge of the facts.

We have searched the record and find no objection lodged either at the time the complained of statements were made or at the completion of the final argument. It has long been the rule of this Court that if improper statements are made by counsel during the trial it is the duty of opposing counsel to register an objection thereto so that the court may make a correction by proper instruction. State v. Evans, 88 Ariz. 364, 356 P.2d 1106 (1906); State v. Boozer, 80 Ariz. 8, 291 P.2d 786 (1955); Sullivan v. State, 47 Ariz. 224, 55 P.2d 312 (1936). The defendant's failure to object to the argument of counsel for the state constituted a waiver of the right to have it reviewed.

Defendant's next assignment is that the trial court erred in denying defendants' motion for a new trial upon the ground of incapacity of a juror and misconduct of the jury. He contends that Betty Jo Hobbs, a juror, was mentally incompetent to perform he duties intelligently, and since this fact was not known to the parties or the court during the trial a new trial must be awarded. In support of such contention defendant points out that less than two hours after the trial was concluded, Mrs. Hobbs was found in a catatonic state in her automobile on the streets of Superior and that she remembered nothing that occurred after the jurors returned from their evening meal on the last day of the trial. At the hearing on the motion for new trial Dr. Howard W. Finke[10] testified that

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[10] Dr. Finke was Mrs. Hobb's personal physician and was called to her car at thetime she was found in the catatonic state.

he diagnosed her condition as a form of hysteria—"a conversion reaction". Dr. Finke stated that this was a normal reaction which any normal person might experience when under a period of stress for some time.[11] He was unable to state exactly when such reaction affected Mrs. Hobbs. However, other jurors testified that there was absolutely no evidence of incapacity upon the part of Mrs. Hobbs either during the trial or during their deliberations. After hearing the evidence, the court decided that Mrs. Hobbs was not disqualified. It does not appear from an examination of the record that the court abused its discretion in such decision. Johnson v. State, 33 Ariz. 354, 264 P. 1083 (1928).

Defendant also contends there was misconduct of the jury inasmuch as pressure had been exerted upon Mrs. Hobbs by the other jurors during their deliberations. Mrs. Hobbs stated in an affidavit that it was her opinion that the defendant was legally insane at the time of the alleged crime and would have so voted had it not been for the pressure exerted upon her by the other jurors. However, the record shows that the jury was polled at the request of the defendant and that when Mrs. Hobbs was asked if that was her verdict she replied "Yes".

The law is well settled in this state that the verdict of the jury in a criminal case may not be impeached by the affidavit of a juror who has, in open court, solemnly agreed to the verdict. State v. Murphy, 79 Ariz. 161, 285 P.2d 614 (1955); State v. Pollock, 57 Ariz. 415, 114 P.2d 249 (1941); Johnson v. State supra.

On a motion for new trial the trial court conducted a full and complete investigation into the matter and after hearing all of the evidence, rendered its decision denying the motion. We hold it did not err.

Defendant's last assignment of error is that the court erred in denying defendant's motion for a new trial upon the ground that

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[11] The trial lasted for nine days.

the verdict was contrary to the weight of the evidence. He contends that the evidence was not sufficient to satisfy the jury of defendent's guilt beyond a reasonable doubt.

In reviewing the sufficiency of the evidence to support a conviction we have on many occasions stated the rule to be that the evidence is to be viewed in the light most favorable to the state, and all reasonable inferences therefrom must b taken in the most unfavorable manner to the defendant. State v. Hilliard, 89 Ariz. 129, 359 P.2d 66 (1961); State v. Evans, 88 Ariz. 364, 356 P.2d 1106 (1960); State v. Milton, 85 Ariz. 69, 331 P.2d 846 (1958); State v. Stephens, 66 Ariz. 219, 186 P.2d 346 (1947). This Court has stated that "we will not substitute our judgment for that of the jury where the verdict finds substantial support in the evidence." State v. Evans, supra. We hold that the evidence was sufficient to sustain the conviction.

The judgment is affirmed.

RENZ L. JENNINGS
Justice

CONCURRING:

CHARLES C. BERNSTEIN
Chief Justice

JESSE A. UDALL
Vice Chief Justice

FRED S. STRUCKMEYER, JR.
Justice

LORNA E. LOCKWOOD
Justice

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MANUEL SILVAS,
Petitioner,

vs.

THE STATE OF ARIZONA,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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(1) The petition was not filed within 90 days after the entry of the judgment of the state court, as is required by Rule 22 (1.) of the Rules of the Supreme Court 3

(2) The federal questions sought to be reviewed by questions 1 and 2, above quoted, were not timely or properly raised in the court below 5

(3) Question 1, above quoted, was answered on the facts and disposed of on state grounds; the alleged federal question was not decided by the state court 6

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 649 Misc.

MANUEL SILVAS, Petitioner,

vs.

THE STATE OF ARIZONA, Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Arizona Supreme Court is entitled State of Arizona, Appellee v. Manuel Silvas, Appellant, No. 1175. It is reported in 372 P.2d 718 and 91 Ariz. 386.

JURISDICTION

The opinion below was delivered by the Arizona Supreme Court on June 27, 1962. A motion for rehearing was filed on July 11, 1962 and denied on July 13, 1962. The order affirming judgment was entered in the minutes of the Arizona Supreme Court and a certified copy thereof with a copy of the opinion was transmitted to the Clerk of the Pinal County Superior Court, from which the appeal was taken, on July 13, 1962, and was filed therein on July 16, 1962.

A Motion for Leave to File a Second Petition for Rehearing was filed on August 30, 1962. The motion was denied on October 30, 1962.

The Petition for Writ of Certiorari was filed on this Court on December 10, 1962. There had been no order granting an extension of time within which to file the petition.

STATEMENT OF THE CASE

The petitioner was convicted of the first degree murder of his paramour. We must take issue with petitioner's statement of facts. There was evidence that petitioner had been drinking, but not that he was "hopelessly" or "incoherently" drunk at the time of the murder. It was admitted that he had fired all the shots involved. Further, neither doctor testified that petitioner was incompetent to be tried. The facts are more clearly reported in the opinion of the court below, 372 P.2d 718, 91 Ariz. 386, a copy of which is appended to the Petition for Writ of Certiorari.

Upon appeal, petitioner contended that the trial court erred in determining that he was able to understand the proceedings and assist in his defense and that the trial court erred in denying his motion for new trial made upon the claim that a juror had been incapacitated during the trial. He contended that these rulings were violations of Arizona Rules of Criminal Procedure 250 and 219.

The Arizona Supreme Court upheld the trial court and affirmed the conviction, holding that the juror was competent at the time of the trial and that petitioner was able to understand the proceedings and assist in his defense. In his Motion for Rehearing, petitioner contended for the first time that the claimed error in the rulings of the trial court constituted a denial of due process under the United States Constitution. The motion was denied, without opinion.

QUESTIONS PRESENTED

Petitioner states that the questions presented for review by this Court are:

"1. Whether due process of law under the Fourteenth Amendment of the Constitution is denied where, in a State criminal proceeding in which a unanimous verdict of twelve is required by State law, one of the jurors becomes mentally incompetent in the course of the trial and the juror is thereupon rendered incompetent to carry out the functions of the jury position?

"2. Whether under the due process clause of the Fourteenth Amendment a person may be tried and sentenced to death

where, by virtue of his mental condition, he is unwilling to assist the defense in the preparation and presentation of the case?"

THE PETITION SHOULD BE DENIED

Respondent respectfully submits that the United States Supreme Court should refuse to take jurisdiction of the Petition for Writ of Certiorari for the reasons that:

(1) The petition was not filed within 90 days after the entry of the judgment of the state court, as is required by Rule 22 (1.) of the Rules of the Supreme Court.

(2) The federal questions sought to be reviewed by Questions 1 and 2, above quoted, were not timely or properly raised in the court below.

(3) Question 1, above quoted, was answered on the facts and disposed of on state grounds; the alleged federal question was not decided by the state court.

(4) Question 2, above quoted, does not present a federal question of substance.

(1) PETITION NOT FILED WITHIN 90 DAYS AFTER ENTRY OF JUDGMENT

Rule 22 (1.) of the Rules of the Supreme Court provides that a Petition for Writ of Certiorari to review the judgment of a state court of last resort in a criminal case must be filed within 90 days after entry of such judgment, unless an extension is granted. No extension was requested or granted in the instant case.

It is well settled that a timely motion for rehearing will toll the time for filing the petition until the motion for rehearing has been decided. The Rules of the Arizona Supreme Court provide for this. Rule 9, on civil appeals, provides that a motion for rehearing may be filed within 15 days after the clerk has given notice of the decision of the court. Rule 14, on civil appeals, provides that a mandate to the trial court will issue 15 days after notice of filing of the opinion of the court, unless a motion for rehearing has been made, in which case the mandate shall not issue until the motion is disposed of. Rule 15 provides that the rules on civil appeals shall apply to criminal appeals insofar

as practicable. Rule 23, on criminal appeals, provides that:

> "When the decision of this court has been filed and an appropriate summary thereof entered on the minutes, and a motion for rehearing, if any, disposed of, a certified copy of the minute entry and a copy of the decision shall be transmitted to the clerk of the court from which the appeal was taken and shall be filed therein."

Arizona Revised Statutes § 13-1720 provides that:

> "After a certified copy of the minute entry and a copy of the decision of the supreme court in a criminal appeal has been remitted to the trial court from which the appeal was taken, the supreme court shall have no further jurisdiction of the appeal, or of the proceedings thereon. All orders which may be necessary to carry the decision of the supreme court into effect shall be made by the court to which the copy of the minute entry and decision is remitted, except when a judgment or sentence of death has been affirmed on appeal after the time appointed for the execution of the sentence and the supreme court has fixed a new time for execution and issued a warrant to the superintendent of the state prison directing him to execute the sentence at the time designated in the warrant."

The opinion of the Arizona Supreme Court was handed down on June 27, 1962. A motion for rehearing was timely filed on July 11, 1962, and denied on July 13, 1962. On that date the Arizona Supreme Court also entered the order affirming judgment in its minutes and transmitted a certified copy of the minute entry and a copy of the decision to the clerk of the court from which the appeal was taken, pursuant to its Rule 23. They were filed in that court on July 16, 1962.

The judgment of the Arizona Supreme Court was entered and it was final on July 13, 1962. On that date the court issued a new warrant of execution, as provided by its Rule 22 (d) and A.R.S. § 13-1720, above quoted, when a judgment or sentence of death has been affirmed on appeal.

Ninety days from the entry of judgment on July 13, 1962, fell on October 11, 1962. Petitioner did not file his petition for Writ of Certiorari until December 10, 1962, some two months too late.

Petitioner's "Petition for Leave to File Second Petition for Rehearing," filed on October 30, 1962, did not affect the finality of the judgment. It was objected to on the ground that the judgment was already final and could not now be reheard. Leave to file the second motion for rehearing was denied. Further, the proposed "Motion for Second Rehearing" concerned an instruction on intent, a matter which had not been raised in either the trial or appellate court and which has no connection with the questions recited in the instant petition.

The Petition for Writ of Certiorari is not timely, having been filed some 150 days after entry of final judgment by the state court. The mere presentation of a motion for leave to file a second request for rehearing will not further suspend the time within which to file a petition for writ of certiorari. *Gypsy Oil v. Escoe*, 275 U.S. 498. Jurisdiction should be refused.

(2) FEDERAL QUESTIONS NOT TIMELY OR PROPERLY RAISED

Petitioner first raised the contention that the trial court's rulings that the juror was competent and that petitioner was able to understand the proceedings and assist in his own defense constituted a denial of due process under the Fourteenth Amendment to the United States Constitution, in his Motion for Rehearing of the decision of the state court on appeal. His appeal had theretofore been based on the contention that the rulings constituted violations of Arizona Rules of Criminal Procedure 250 and 219. The motion was denied, without opinion.

An attempt to raise a federal question after judgment, upon a motion for rehearing, comes too late, unless the court actually entertains the question and decides it. *Herndon v. Georgia*, 295 U.S. 441; *American Surety Co. v. Baldwin*, 287 U.S. 156.

Petitioner's Question 2 concerns the defendant who is "unwilling" to assist in his own defense. This question was never presented to nor decided by the state court. The question before the court was one of fact: whether or not petitioner was *able* to understand the proceedings and assist in his own defense, under

Arizona Rule of Criminal Procedure 250. In the course of affirming the trial court's finding that petitioner was in fact able, the state supreme court cited the testimony of the psychiatrists that petitioner was merely *unwilling* to assist in his defense and that this unwillingness was under his control. Petitioner made no contention that an unwilling defendant could not be tried and no further question was raised or considered.

Since the alleged federal questions were not timely or properly raised, jurisdiction should be refused.

(3) QUESTION 1 WAS DETERMINED ON A NONFEDERAL GROUND IN STATE COURT

Petitioner's Question 1 is concerned with a mentally incompetent juror. The state court held that the juror was not in fact incompetent, pointing out that her fellow jurors testified that there was absolutely no evidence of her later hysterical reaction during either the trial or the deliberations. The thoroughness and the extent of the inquiry are clearly set out in the opinion of the court below.

Since the state court decided the question on the nonfederal ground of competency, as a fact, the alleged federal question of the effect of an incompetent juror was never reached. This Court has repeatedly stated that it will not take jurisdiction of a question that was or might have been decided by the state court on a sufficient nonfederal ground. *Durley v. Mayo*, 351 U.S. 277; *Stembridge v. Georgia*, 343 U.S. 541; *Young v. Ragan*, 337 U.S. 235; *Dixon v. Duffey*, 344 U.S. 143; *Buck v. California*, 343 U.S. 99. Jurisdiction should be refused.

(4) QUESTION 2 DOES NOT PRESENT A FEDERAL QUESTION OF SUBSTANCE

Petitioner raises the question whether one who is unwilling to assist in the preparation and defense of his case may be tried and convicted.

The evidence herein showed that both examining psychiatrists found that petitioner was able to understand the proceedings and

that he was able to assist in his defense. They stated that he was merely unwilling to assist and that this unwillingness was within his control. Their testimony is set out in the opinion of the court below.

This does not present a federal question of substance. If a man chooses to refuse to assist counsel in his own defense, his unwillingness would not present a constitutional barrier to his being tried. Jurisdiction to review this purported question should be refused.

CONCLUSION

For the reasons stated, respondent submits that this Court lacks and should not take jurisdiction over the questions presented by petitioner.

We respectfully urge that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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